HATARA (M) SDN BHD A

v.

PETROLIAM NASIONAL BHD & ANOR

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: W-02-962-2004]
8 JANUARY 2010 C

CIVIL PROCEDURE: *Action - Reinstatement of action, application for - Action struck out for failure to comply with case management direction - Whether non-compliance intentional and contumelious - Whether merits of case heard - Whether plaintiff able and willing to proceed with action - Whether plaintiff prejudiced if reinstatement not allowed - Rules of the High Court 1980, O. 35 r. 2(1), O. 92 r. 4* D

CIVIL PROCEDURE: *Action - Reinstatement of action, application for - Delay of three months in making application - Whether delay due to plaintiff's impecuniousness - Whether delay justified* E

CIVIL PROCEDURE: *Action - Reinstatement of action, application for - Action struck out - Proper course of action - Whether by way of appeal to Court of Appeal* F

CIVIL PROCEDURE: *Case management - Failure to comply with direction - Whether striking out of action justified - Whether application for reinstatement should be allowed*

This was the plaintiff's appeal against the dismissal of its application for reinstatement of its action against the defendants that was struck out by the learned judge for failure to comply with a case management direction. The facts showed that the court had made a peremptory order that if the plaintiff failed to comply with the case management direction by 16 April 2004, the plaintiff's action commenced on 30 April 1999 would be struck out. Come 16 April 2004, plaintiff's counsel informed the court that he was unable to comply with the said direction and made an application to discharge himself. The court then enforced the peremptory order and struck out the action. The plaintiff then filed the application to reinstate the action which application was dismissed with costs. Hence, the plaintiff's appeal. Before the court, the 1st defendant G H I

submitted that the plaintiff's application for reinstatement to the High Court was procedurally flawed. It was submitted that the proper course of action to be taken by the plaintiff in the circumstances was to appeal to the Court of Appeal against the striking out order.

Held (allowing the appeal)
Per Hasan Lah JCA delivering the judgment of the court:

(1) It must be noted that the plaintiff's case was struck out and not dismissed. There was a distinction between striking out and dismissing a case. If the case was struck out, O. 35 r. 2(1) Rules of the High Court 1980 ('RHC') could be utilised to apply for reinstatement. When the case was dismissed, the avenue open to the aggrieved party was to appeal. (para 11)

(2) From the notes of proceeding on 16 April 2004, the learned judge did not hear any explanation from the plaintiff's counsel for the alleged non-compliance of the peremptory order. Counsel for the plaintiff informed the court that they were discharging themselves. The plaintiff's representative was not present. The plaintiff's managing director claimed that he went to Wisma Denmark instead of Bangunan Sultan Samad where the case management was being heard. His counsel applied for another date for case management so that the court could hear the counsel's application for discharge first. Further, when making the striking out order, the learned judge did not hear the case on its merits. (paras 12 & 13)

(3) On the facts, the plaintiff had *locus standi* to apply to reinstate this action under the inherent jurisdiction of the court pursuant to O. 92 r. 4 RHC as the suit had not been heard. Where the rules did not lay down a particular form of procedure to meet the exigencies of a case, the court might exercise its powers under O. 92 r. 4. (para 15)

(4) The drawback in hearing this appeal was that there was no written judgment given by the learned judge. It was not known whether the plaintiff's application for reinstatement was dismissed because the learned judge found the court had no jurisdiction or because the court was of the view that the discretion ought not to be exercised in the plaintiff's favour. An appellate court will not interfere with the discretion exercised by a lower court unless it was truly satisfied that the discretion had been exercised in a contrary way or that there had been a miscarriage of justice. (para 16)

(5) The plaintiff's explanation that the delay of three months in making the application for reinstatement was due to its impecuniousness was reasonable. The plaintiff had to take time to find money to pay counsel's fees. It was clear that the plaintiff's counsel wanted a discharge on the ground that they were not paid their fee by the plaintiff. (para 17)

(6) The plaintiff claimed that the documents were ready for filing by the 16 April 2004 but were not filed because the plaintiff's counsel had filed an application for discharge on 15 April 2004. On 16 April 2004 the plaintiff's counsel applied for a new case management so that the plaintiff could get another counsel to represent them. On the facts, it could not be decided whether the plaintiff's conduct in not complying with the peremptory order of the court was intentional and contumelious. (paras 18 & 19)

(7) The plaintiff claimed that there was merit in its claim against the defendants and that it was able and willing to proceed with the action. The plaintiff further claimed that it would be prejudiced, should the court decide not to allow its application for reinstatement since a fresh action against the defendants would be barred by limitation. It followed that to strike out the plaintiff's suit in such circumstances would involve an error in principle in the exercise of judicial discretion and occasion a substantial miscarriage of justice. As such, this was a fit and proper case for interference by this court. (paras 20 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan plaintif terhadap penolakan permohonan untuk memulihkan guamannya terhadap defendan yang telah dibatalkan oleh yang arif hakim akibat dari kegagalan mematuhi arahan pengurusan kes. Fakta menunjukkan bahawa mahkamah telah membuat satu perintah muktamad bahawa jika plaintif gagal mematuhi arahan berkenaan sehingga 16 April 2004, maka tindakan plaintif yang dimulakan pada 30 April 1999 akan dibatalkan. Apapun, pada tanggal 16 April 2004 tersebut, peguam plaintif memberitahu mahkamah bahawa beliau masih tidak dapat mematuhi arahan dan sekaligus membuat permohonan untuk menarik diri dari mewakili plaintif. Berikutnya mahkamah menguatkuasakan perintah muktamad dan membatalkan guaman. Plaintif kemudian memfailkan permohonan untuk memulihkan guamannya, tetapi permohonannya

telah ditolak dengan kos oleh Mahkamah Tinggi. Maka plaintif memfailkan rayuan di sini. Di hadapan mahkamah, defendan pertama berhujah bahawa permohonan plaintif ke Mahkamah Tinggi untuk pemulihan adalah cacat dari segi prosedur. Dihujahkan bahawa tindakan yang sewajarnya diambil oleh plaintif dalam halkeadaan yang wujud adalah untuk merayu ke Mahkamah Rayuan terhadap perintah pembatalan.

Diputuskan (membenarkan rayuan)
Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Harus diingat bahawa kes plaintif adalah dibatalkan dan bukannya ditolak. Terdapat perbezaan di antara membatalkan dan menolak sesuatu kes. Jika kes dibatalkan, maka A. 35 k. 2(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') boleh digunakan bagi memohon pemulihan semula. Apabila kes ditolak, ruang yang terbuka kepada pihak adalah untuk merayu.

(2) Berdasarkan nota prosiding pada 16 April 2004, yang arif hakim tidak mendengar sebarang penjelasan dari peguam plaintif berkaitan ketidakpatuhan terhadap perintah muktamad yang dikatakan. Peguam plaintif hanya memberitahu mahkamah bahawa beliau telah menarik diri, sementara wakil plaintif pula tidak hadir di mahkamah. Pengarah Urusan plaintif mendakwa bahawa beliau telah pergi ke Wisma Denmark dan tidak ke Bangunan Sultan Abdul Samad di mana pengurusan kes didengar. Peguamnya telah memohon satu tarikh baru bagi pengurusan kes bagi membolehkan mahkamah mendengar dahulu permohonan untuk menarik diri. Selain itu, bila membuat perintah pembatalan, yang arif hakim tidak mendengar kes berdasarkan merit.

(3) Berdasarkan fakta, plaintif mempunyai *locus standi* untuk memohon memulihkan guamannya di bawah bidangkuasa sedia ada mahkamah di bawah A. 92 k. 4 KMT disebabkan guaman masih belum didengar. Di mana kaedah-kaedah tidak membentangkan suatu prosedur khas bagi menghadapi keterdesakan sesuatu kes, mahkamah boleh melaksanakan kuasanya di bawah A. 92 k. 4.

(4) Satu kekurangan dalam mendengar rayuan di sini adalah tidak adanya alasan penghakiman yang ditulis oleh yang arif hakim. Tidak diketahui sama ada permohonan plaintif untuk pemulihan semula telah ditolak kerana yang arif hakim mendapati

mahkamah tiada bidangkuasa atau kerana mahkamah berpendapat bahawa budibicara tidak harus dilaksanakan secara yang berpihak kepada plaintif. Sebuah mahkamah rayuan tidak akan mencampuri dengan suatu pelaksanaan budibicara oleh mahkamah lebih rendah, kecuali jika ia berpuashati sepenuhnya bahawa budibicara telah dilaksanakan dengan cara yang songsang atau jika berlaku salah laksana keadilan.

(5) Penjelasan plaintif bahawa kelengahan selama tiga bulan dalam membuat permohonan pemulihan semula adalah disebabkan oleh kemiskinannya adalah munasabah. Plaintif memerlukan masa untuk mendapatkan wang bagi membayar yuran guamannya. Adalah jelas bahawa peguam plaintif berhasrat untuk menarik diri kerana yuran mereka tidak dibayar oleh plaintif.

(6) Plaintif mendakwa bahawa dokumen-dokumen sudah sedia untuk difailkan pada 16 April 2004, tetapi tidak difailkan kerana peguam plaintif telah pun memfail permohonan untuk menarik diri pada 15 April 2004. Pada 16 April 2004 peguam plaintif memohon untuk satu pengurusan kes yang baru bagi membolehkan plaintif mendapatkan peguam yang baru untuk mewakilinya. Berdasarkan fakta, ianya tidak dapat diputuskan sama ada kelakuan plaintif dalam tidak mematuhi perintah muktamad mahkamah adalah disengajakan atau bertujuan untuk menghina mahkamah.

(7) Plaintif mendakwa bahawa tuntutannya terhadap defendan adalah bermerit dan bahawa ia sentiasa bersedia dan sanggup untuk meneruskan dengan guaman. Plaintif menyatakan seterusnya bahawa ia akan diprejudis jika mahkamah memutuskan untuk tidak membenarkan permohonan untuk pemulihannya, kerana suatu guaman yang baru akan dihalang oleh had masa. Ianya mengikut bahawa membatalkan tindakan plaintif akan mewujudkan kekhilafan prinsip dalam melaksanakan budibicara kehakiman dan sekaligus akan menyebabkan salah laksana keadilan yang besar. Oleh yang demikian, ini adalah suatu kes yang wajar dan sesuai untuk mahkamah ini campur tangan.

Case(s) referred to:

Arab Malaysian Credit Bhd v. Tan Seang Meng [1995] 1 CLJ 773 CA ***(refd)***

Chua Cheng Wan v. Chua Thiam Siew & Ors [2001] 1 CLJ 433 HC ***(refd)***

Lim Oh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 FC ***(refd)***

Malaysia Travel Bureau Sdn Bhd v. Melia Majlis [2008] 1 LNS 333 HC ***(refd)***

Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd [2004] 3 CLJ 88 CA ***(refd)***
Multiview Enterprise Sdn Bhd v. Orientus Industry Sdn Bhd [2005] 7 CLJ 17 HC ***(refd)***
Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 ***(refd)***
Rachman v. Tabrum [1923] 39 LTR 380 ***(refd)***
Ratnam v. Cumarasamy & Anor [1964] 3 AII ER 393 ***(refd)***
Tan Lee Siang & Ors v. Kenneison Brothers Sdn Bhd [1999] 3 CLJ 422 HC ***(refd)***
Tee Ha Leong v. Messrs Low & Lim & Anor [2005] 2 CLJ 78 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 92 r. 4

For the appellant/plaintiff - Tabian Tahir; M/s Tabian Tahir & Co
For the 1st respondent/1st defendant - Shamsul Bahrin Manaf (Syarihah Razman with him); M/s Shook Lin & Bok
For the 2nd respondent/2nd defendant - CS Wong; M/s Lee Hishamuddin

[Appeal from High Court, Kuala Lumpur; Suit No: D2-22-1228-1999]

Reported by Usha Thiagarajah

JUDGMENT

Hasan Lah JCA:

[1] This is the appellant's appeal against the High Court's decision given on 16 August 2004 dismissing the appellant's application *vide* a summons in chambers dated 16 July 2004.

[2] On 3 August 2009 we allowed the appeal with costs. We now give the grounds of our decision.

[3] In this judgment we will be referring to the appellant as "the plaintiff" and the 1st and 2nd respondents as "the 1st defendant" and "the 2nd defendant" respectively.

[4] The plaintiff commenced the action in the High Court against the 1st defendant and the 2nd defendant on or about 30 April 1999 purportedly for the defendants' failure to amend the terms of a letter of credit issued by Banque Paribas.

[5] On 18 August 2003, the plaintiff took out a notice for pre-trial case management. The case management was held on 23 September 2003, 3 December 2003 and 4 March 2004.

[6] On 4 March 2004, the parties informed the court that all the documents had been agreed upon. The court fixed a final case management date on 16 April 2004 for the plaintiff to comply with the case management direction. The court had also made a peremptory order that if the plaintiff failed to comply with the case management direction by 16 April 2004, the action would be struck out.

[7] On 16 April 2004, counsel for the plaintiff, Mr. Tabian Tahir informed the court that he was unable to comply with the case management direction and would apply to discharge himself. He did not request for more time to comply with the case management direction.

[8] Given the plaintiff's failure to comply with the case management direction, the court enforced the peremptory order and struck out the action ("the striking out order"). The plaintiff did not appeal against the striking out order.

[9] On 16 July 2004, the plaintiff filed an application to reinstate the action *vide* the summons in chambers dated 16 July 2004. The reinstatement application was dismissed with costs on 16 August 2004.

[10] Before us learned counsel for the 1st defendant submitted that the plaintiff's application for reinstatement to the High Court was procedurally flawed. The proper course of action to be taken by the plaintiff in the circumstances of the case was by way of an appeal to the Court of Appeal against the striking out order. In support of that the following cases were cited:

(a) *Malaysia Travel Bureau Sdn Bhd v Melia Majlis* [2008] 1 LNS 133;

(b) *Multiview Enterprise Sdn Bhd v. Orientus Industry Sdn Bhd* [2005] 7 CLJ 17;

(c) *Chua Cheng Wan v Chua Thiam Siew & Ors* [2001] 1 CLJ 433.

(d) *Lim Oh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233.

[11] It must be noted that the plaintiff's case was struck out and not dismissed. There is a distinction between striking out and dismissing a case. In *Tee Ha Leong v. Messrs Low & Lim & Anor* [2005] 2 CLJ 78 James Foong J (as he then was) said at p. 83:

> Having considered the above authorities, which are all made – by courts of concurrent jurisdiction, I am of the view that there is a distinction between striking out and dismissing a case. If the case is struck out then O. 35 r. 2(1) of the RHC can be utilised to apply for reinstatement. But when the case is dismissed, as in this instance case, then the avenue open to the aggrieved party is to appeal. This is based on the rational that the case was already heard on merits.

[12] It is also to be observed from the notes of proceeding on 16 April 2004 the learned judge did not hear any explanation from the plaintiff's counsel for the alleged non-compliance of the peremptory order. Counsel for the plaintiff informed the court that they were discharging themselves. The plaintiff's representative was not present. In the affidavit-in-support of the plaintiff's summons in chambers dated 16 July 2004 Muhammad Nur Affendi bin Mohamad Radzi, the plaintiff's Managing Director, stated in para 13 of his affidavit that on that day he went to Wisma Denmark and not Bangunan Sultan Abdul Samad. His counsel applied for another date for case management so that the court could hear the application by the plaintiff counsel to discharge themselves first.

[13] What is also clear from the notes of proceeding is that when making the order of striking out of plaintiff's suit the learned judge did not hear the case on merits.

[14] In *Tan Lee Siang & Ors v. Kenneison Brothers Sdn Bhd* [1999] 3 CLJ 422 KC Vohrah J cited with approval the observation made by Lord Chief Justice Hewart in *Rachman v. Tabrum* [1923] 39 LTR 380 at p 381:

> The principle is where a summon to case has not been heard, but merely struck out, the court may if it thinks fit, hear or entertain the summon or case, but if there has been a hearing on the merits, though in the absence of one party, it cannot do so after the order is perfected.

[15] On the facts of the present case we were satisfied that the plaintiff had locus to apply to reinstate this action under the inherent jurisdiction of the court pursuant to O. 92 r. 4 of the Rules of the High Court 1980 as the suit had not been heard.

Where the rules do not lay down a particular form of procedure to meet the exigencies of a case, the court may exercise its powers under O. 92 r. 4. (see *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319). In *Arab Malaysian Credit Bhd v. Tan Seang Meng* [1995] 1 CLJ 773 at p. 782. Gopal Sri Ram JCA said:

> Quite apart from O. 6 r. 7, there is wide power under O. 3 r. 5 conferred upon the High Court to extend time. Even the restriction of granting more than one extension of 12 months expressed in O. 6 r. 7 may, in appropriate cases, be overcome by having resort to O. 92 r. 4 (absent in the English RSC) which is a jurisdictional provision. (see *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 MLJ 143).
>
> Further, in a recent and yet unreported judgment of this court, reference has been made to the important principle that a rule of court should not be construed so as to produced unfairness or a manifest injustice. (see *Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd*, Court of Appeal Civil Appeal No. P-02-7-94 (since reported in [1995] 1 MLJ 292). Surely, this principle may be invoked to overcome any technical obstacles in the way of achieving substantial justice in a case where a pedantic approach to a rule of court will result in injustice.

[16] The drawback in hearing this appeal was that there was no written judgment given by the learned judge. We do not know whether the plaintiff's application for reinstatement was dismissed because the learned judge found the court had no jurisdiction or because the court was of the view that the discretion ought not to be exercised in the plaintiff's favour. An appellate court will not interfere with the discretion exercised by a lower court unless it is truly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice. (See *Ratnam v. Cumarasamy & Anor* [1964] 3 AII ER 393).

[17] Learned counsel for the 1st defendant also raised the issue of delay on the plaintiff's part in making the application for reinstatement. The suit was struck out on 16 April 2004 but the application was filed by the plaintiff on 16 July 2004. It was a delay of about three months. In the plaintiff's affidavit-in-support the plaintiff explained the reason for the delay in para 18. The plaintiff took time to find money to pay the counsel's fees. It was clear

from the affidavit that the plaintiff's counsel wanted to discharge themselves on the ground that they were not paid their fees by the plaintiff. We were of the view that the explanation that the delay was due to the plaintiff's impecuniosity was reasonable.

[18] The next issue for determination is whether the discretion should be exercised in favour of the plaintiff. In the plaintiff's affidavit-in-support the plaintiff stated that by 16 April 2004 the documents were ready for filing but were not filed by the plaintiff's counsel because on 15 April 2004 the plaintiff counsel had filed an application to discharge themselves on the ground that the plaintiff did not pay them the fees. On 16 April 2004 the plaintiff's counsel applied for a new date for case management so that the plaintiff could get another counsel to represent them.

[19] On the facts of the present case we are unable to say that the conduct of the plaintiff in not complying the peremptory order of the court was intentional and contumelious. In this connection the Court of Appeal in *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88 at p. 94 said:

> Order 34 r. 7 provides for the discretionary power of the judge to make such order against the defaulting party "as meets the ends of justice" should any party fail to comply with any direction given by the judge at any pre-trial case management conference.
>
> Whilst it is true that a party's action or counterclaim could be struck out for non-compliance with a peremptory or an unless order of the court, the order would not be made unless there is a history of failure to comply with other orders. A peremptory or an unless order is an order of last resort (see *Hytec Ltd v. Coventry City Council* [1997] 1 WLR 1666 at p. 1674 para H). Surely, it would not meet the ends of justice if the order made results in a miscarriage of justice. Therefore, all the circumstances of the case, inclusive of whether the failure to comply with the peremptory or unless order was indeed intentional and contumelious, should be looked at by the judge before penalizing the defaulting party (see *In re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 1196 CA).

[20] In the affidavit-in-support the plaintiff stated that there was merit in the claim and the plaintiff was willing and able to proceed with the action. According to the plaintiff if the application for reinstatement is not allowed the plaintiff would be prejudiced because a fresh action against the defendants would be barred by the limitation period.

[21] In our view, to strike out the plaintiff's suit in such circumstances would involve an error in principle in the exercise of judicial discretion and it had occasioned a substantial miscarriage of justice. We were of the view that this was a fit and proper case for interference by this court. Accordingly, we allowed the appeal and set aside the order of the learned judge and reinstated the case. With regard to costs we ordered that costs of this appeal and all costs thrown away as a result of the striking out of the plaintiff's suit be borne by the plaintiff and the deposit paid into court be paid to the defendants to account of taxed costs.

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